Supreme Court U.S.

- 2007

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No. _____

In The

Supreme Court of the United States

BORDER BUSINESS PARK,

Petitioner,

v.

THE CITY OF SAN DIEGO,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

DAVID B. CASSELMAN
WASSERMAN, COMDEN & CASSELMAN LLP
5567 Reseda Blvd., Suite 330
Tarzana, California 91356
(818) 705-6800

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Does the requirement of "direct and special" harm – in cases involving "a taking without direct legal restraint or physical intrusion" – exonerate a public entity whenever it "takes" private property from *more than one* owner?

2. Is a city's predatory pre-condemnation conduct – i.e., where an entity intentionally devalues private property so it can acquire the property for less in a later condemnation proceeding – actionable under the Fifth and Fourteenth Amendments?

3. Must a court considering a Fifth Amendment "taking clause" claim in the context of discontinued acquisition plans scrutinize ***both*** (1) the propriety of the condemning authority's actions; and, (2) the impact of those actions on the subject property?

4. Should the Court reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts (as previously enunciated in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985))?

PARTIES

Petitioner Border Business Park is a family-owned business. The principals in the business are a San Diego businessman, Roque De La Fuente II, and his mother, Bertha De La Fuente..

Respondent is the City of San Diego, a California municipality.

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The opinion of the California Court of Appeal, Fourth Appellate District, Division One is reported at 142 Cal.App.4th 1538 [49 Cal.Rptr.3d 259]. The California Supreme Court's order denying review is unreported, No. S147706.

JURISDICTION

The California Court of Appeal's decision in this case was issued on September 19, 2006. The California Supreme Court denied review of the case on January 3, 2007.

Final judgments rendered by a state's highest court are reviewable by writ of certiorari where the validity of any treaty or federal statute is drawn into question or where the constitutionality of a state law is at issue. 28 U.S.C. § 1257.

According to the Court in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172 (1985), a landowner (such as Border) seeking compensation for a "taking" by a local authority must first seek compensation through state procedures before pursuing relief in federal court. *Id.* at 194-195; see also *Lockary v. Kayfetz*, 908 F.2d 543, 548-549 (9th Cir. 1990). Where (as here) the state appellate court's judgment itself unexpectedly deprives a party of a federal constitutional right, the constitutional question involved may be raised for the first time in a petition for writ of certiorari. *Tidal Oil Co. v. Flanagan* (1924) 263 U.S. 444, 455. "[T]he question in such cases could not well be raised until the handing down of

the opinion indicating that the objectionable judgment was to follow." *Ibid.*

The state court's decision reversed a judgment in favor of Petitioner and remanded the matter for further proceedings. Nonetheless, the state court's judgment is considered "final" for purposes of certiorari review under 28 U.S.C. § 1257. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-483 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

This case implicates the "takings" clauses of the Fifth and Fourteenth Amendments, as applied to a "pre-condemnation blight" claim for "inverse condemnation" – i.e., the exercise of the sovereign's power of eminent domain without the initiation of formal condemnation proceedings. See *Agins v. City of Tiburon*, 447 U.S. 255, 258, n. 2 (1980); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

STATEMENT OF THE CASE

In the early 1980s, Otay Mesa – an undeveloped area twenty minutes southeast of downtown San Diego – was a virtual wasteland. However, Otay Mesa was potentially an ideal site for industry and commerce. It was flat, making it ideal for very large industrial facilities; it was surrounded by four major roads; and it was close to the area where the United States and Mexico were planning to open a new border crossing.

In 1983, Petitioner Border Business Park, Inc. (Border) purchased 312 acres in Otay Mesa from the State of California; the property eventually was developed into what became known as "De La Fuente Business Park" (the Park).

In 1984, the City of San Diego (the City) also "jumped into the act," by initiating annexation proceedings regarding Otay Mesa. At first, Border opposed City annexation of the area. However, in 1985, Border withdrew its opposition to annexation, in exchange for promises the City made to Border pursuant to a legislatively-approved Development Agreement. Such contracts permit governments to offer special arrangements which effectively freeze existing laws for a period of time, in exchange for substantial commitments from private property owners.

Border had five main obligations under the Development Agreement: (1) build infrastructure in the Business Park – roads, sidewalks, sewers, and traffic lights, at a cost of $24 million; (2) pay $3 million to construct roads and a bridge four miles away from the Park; (3) pay a $300,000 drainage fee; (4) pay a $10.5 million sewer fee; and, (5) donate 14-acres of Park property to the City for a "temporary" drainage basin. In return, the City promised that: (1) Border would be entitled to develop the property under rules, regulations, and construction specifications existing on the date the Agreement was executed; and, (2) if a subsequent change in law helped development, then Border was entitled to the benefit of that change.

At the time, "development agreements," such as the one between Border and the City, were a favored means by which municipalities coerced private investors into paying for infrastructure that would otherwise be a drain on

public funds. Eventually, when the development began generating income, the City reaped the long-term benefits of its agreement in the form of additional tax revenues.

On the other hand, the Development Agreement was a powerful marketing tool for Border. By 1988, Border had sold 16% of the Park land for about $22 million.

In late 1988, this highly successful development soon came to a screeching halt, when the City realized it could enforce new laws it had passed to obtain the same financial benefits it had negotiated. It no longer needed development agreements and thus vowed not to enter into any other development agreements. At the same time, the City began aggressively violating its Development Agreement promises to Border. One of its promises involved a regional plan for the area, incorporated expressly into the Development Agreement. That community plan for Otay Mesa specifically stated the area would **not** be considered as a location for an airport.

Well aware of the consequences of its reversal of position on the growing business park, the City unilaterally decided to publicly announce that it had selected Otay Mesa as an ideal location for an international airport (called "Twin Ports"). The effect of such an announcement was guaranteed blight, which effectively terminated all sales in Border Business Park overnight. One morning, Border's owner woke up, "looked at the newspaper, and on the front page of the *San Diego Union*, they showed these two beautiful runways and a line that says this is where is going to be the next San Diego International Airport. I looked at the picture and, to my surprise, it went on top of our property."

At the same time as the City began considering the Twin Ports proposal, it also began treating its other commitments to Border differently – thwarting the Park's development, driving its potential customers to its competitors, and causing substantial damages. Simultaneously, the City was pressing Border in foreclosure actions the instant an assessment bond payment became delinquent and began preparing formal condemnation of the Border property.

In post-trial proceedings, the trial court found the evidence sufficient to show the City intended to stifle development and thereby devalue Border's property in anticipation of future acquisition for the airport. The City planned to accomplish the devaluation of Border's property through a long series of breaches – functionally terminating its Development Agreement with Border:

> In 1988, the City imposed new conditions and expenses, including $15 million of additional costs, in connection with the mapping requirements for the industrial park.
>
> In 1989, the City began delaying consideration of Border's permit applications.
>
> In 1990, the City imposed an entirely new and costly change in the construction specifications for streets being improved by Border under the Development Agreement.
>
> In 1990, despite provisions in the Development Agreement prohibiting it, the City imposed a "Housing Trust Fund" fee of $1.20 per square foot for any building in the Park.
>
> In 1991, the City determined that Park owners or tenants who wanted to park their own trucks on their

> own property would have to obtain a conditional use permit or be ticketed at $1,000 per day per violation.
>
> In 1993, the City initiated foreclosure proceedings on the assessment bonds used for Border's infrastructure improvements.
>
> In 1995, the City changed the route for truck traffic waiting for border inspection and began sending loaded tractor trailer trucks around and through the Park. At varying times every day (especially after 4:30 p.m.), a long line of trucks backed up through the Park; all three lanes were completely blocked; the trucks were literally parked in a line for miles; the gridlock frequently lasts two or three hours.

The City's conduct eventually had the desired effect. In 1996, Border filed for bankruptcy protection. Ironically, by that time, the City had scrapped its plans for the Twin Ports airport. Apparently, the Mexican government was not interested in the project – and never had been. (The evidence at trial established that the City had **never** contacted the appropriate Mexican government officials.) A state court trial judge found the City's public announcement of a U.S./Mexican partnership to have been "reckless."

Financially destroyed, Border sued the City for breach of contract and inverse condemnation.[1] After a month-long trial, a jury awarded Border damages in the amount of

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[1] The phrase "inverse condemnation" generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. *Agins v. City of Tiburon*, 447 U.S. 255, 258, n. 2 (1980); *United States v. Clarke*, 445 U.S. 253, 257 (1980).

$93.9 million – broken down as follows: (1) inverse condemnation damages for the airport taking: $25.5 million; (2) inverse condemnation damages for truck traffic taking: $39.2 million; and, (3) contract damages: $29.2 million. In ruling on the City's post-trial motions, the trial court ultimately reduced the jury's verdict to the sum $65.3 million.

The City appealed, and the California appellate court reversed the judgment. With regard to Border's inverse condemnation claim, the appellate court stated:

> In order to prevail on a claim of inverse condemnation, "there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury." [Citation] The landowner's property must be "singled out for singular and unique treatment" in contrast to other landowners who could be affected by the proposed public work. [Citation] "[T]he widespread impact resulting from mere general planning is noncompensable." [Citation] If the plaintiff's situation is "no different than that of any other landowner" in the area to be affected by the proposed plan, [inverse condemnation] does not apply. [Citation]
>
> Border produced no evidence that the airport proposal affected it in any unique manner. On the contrary, the undisputed evidence – adduced by Border itself – shows that the City's proposal concerning the airport affected owners of other business and industrial parks in Otay Mesa as well as Border, and in the same ways. Patrick Kennedy, an economist retained by Border to assess the economic impact of the City's alleged

> breaches of the development agreement, including the proposal to build the airport in Otay Mesa, testified that the . . . proposal for the Otay Mesa airport affected property values not just in Border Business Park but in other developments as well which were within the airport "footprint." (App. 11a-12a)
>
> . . . Because there was no evidence that the airport proposal directly and specially affected Border, as opposed to the entire section of Otay Mesa within the proposed airport site, the airport inverse condemnation claim fails as a matter of law. (App. 15a)

In effect, the California Court of Appeal created a new defense to inverse condemnation which both implicitly and expressly violates the federal constitution. By harming two property owners, a public agency can create its own defense to the charge that it "took" property from the first. The public policy incentives are completely backwards. Plus, if allowed to stand, the appellate court's decision effectively obliterates the entire concept of "inverse condemnation." Armed with such rhetoric, a public agency can take any private property by simply harming others, as well. Then, it can defend itself by claiming the taking was not "unique" – and thus not actionable. *Every taking will be without just compensation.*

Border petitioned the California Supreme Court for review arguing (among other things) that the decision of the Fourth Appellate District, Division One in this case creates conflict and exacerbates uncertainty among the courts of appeal regarding what constitutes "direct and special" injury for purposes of establishing inverse condemnation. Border pointed out that the California appellate court's ruling that "special and direct" harm exists

only where the plaintiff's property suffers "singular and unique treatment" in contrast to other property in the project footprint cannot be correct and is bad policy. Under such a rule, the more extensive the wrong, the less the government entity is responsible. So long as the wrong broadly affects more than one property owner in the project site, there is no remedy for the taking – no matter how unreasonable the government's conduct.

The California Supreme Court denied review of the Court of Appeal's decision on January 3, 2007. The courts' rejection of Border's inverse condemnation claim against the City is therefore final.

REASONS FOR GRANTING THE PETITION

I. THE CALIFORNIA COURT OF APPEAL'S DECISION IN THIS CASE ESTABLISHES A DANGEROUS PRECEDENT WHICH THREATENS TO UNDO THE DELICATE BALANCE REACHED BY THE FEDERAL COURTS IN CASES INVOLVING A TAKING WITHOUT DIRECT LEGAL RESTRAINT OR PHYSICAL INTRUSION.

A. The Fifth and Fourteenth Amendments Bar "[G]overnment From Forcing Some People Alone to Bear Public Burdens Which, in All Fairness and Justice, Should Be Borne by the Public as a Whole."

The Fifth Amendment to the Constitution, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation."

Recently, this Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), noted that one of the Fifth Amendment's chief goals is to bar "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 538. Justice O'Connor recognized this same policy in her dissenting opinion in *Kelo v. City New London*, 545 U.S. 469 (2005), stating, " . . . the just compensation requirement spreads the cost of condemnation and thus prevents the public from loading upon one individual more than his just share of the burdens of government." *Id.* at 497 (O'Connor, J., dissenting).

As stated by Justice Thomas in *Kelo v. City of New London*, supra, 545 U.S. 469, " . . . it is imperative that the Court maintain absolute fidelity to the [Takings] Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the bill of Rights more generally." *Id.* at 507 (Thomas, J., dissenting).

B. It Is Essential to Proper Application of the Fifth and Fourteenth Amendments That Governmental Entities Understand the Constitutional Limits On Their Pre-Condemnation Conduct.

Federal courts have long recognized "governmental action short of acquisition or occupancy may constitute a constructive or de facto taking" – such as where plaintiff's property remains "under a cloud of condemnation for five years." See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979); see also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Generally, "[f]ederal courts considering taking claims in

the context of discontinued acquisition plans have ... followed the trend toward finding an unconstitutional taking without direct legal restraint or physical intrusion." *Thompson v. Tualatin Hills Park and Recreation Dist.*, 496 F.Supp. 530, 541 (D. Oregon 1980).

While there is a plethora of case law defining the proper limits of a governmental taking in the context of a formal condemnation proceeding, there is precious little law on an increasingly common phenomenon – namely, active conduct on the part of the government which depresses land values prior to condemnation (known as "planning blight" or "pre-condemnation blight"). See *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1147 (9th Cir. 1983); also generally Kanner, "Condemnation Blight: Just How Just is Just Compensation?", C730 ALI-ABA 219 (1992).

As a result of the lack in case law on the subject, the state and federal courts' recognition and treatment of "pre-condemnation blight" claims is spotty and inconsistent.[2]

One line of cases has developed in which courts (such as the California court in this case) have resisted holding governmental entities liable by erecting insurmountable obstacles to the property owner's "inverse condemnation" claims. See *Martino v. Santa Clara Valley Water District*,

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[2] Several courts have bemoaned the lack of precise guidelines in "pre-condemnation blight" cases. See *City of Buffalo v. J. W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895 (1971) [describing this area of the law as "somewhat amorphous and apparently perplexing" and in need of "clearly defin[ed] and firmly establish[ed] ... perimeters"]; *Board of Educ., City of Detroit v. Clarke*, 280 N.W.2d 574, 557, n. 1 (Mich. 1979) ["the United States Supreme Court has not yet adopted a definitive stance"].

supra, 703 F.2d at 1147 [raising "standing" and "ripeness" issues]; *City of Buffalo v. J. W. Clement Co.*, 269 N.E.2d 895 (N.Y. 1971); *Orfield v. Housing and Redevelopment Authority*, 232 N.W.2d 923 (Minn. 1975).

In another line of cases, courts have embraced the notion that a "taking" occurs where (as here) a city acts deliberately to reduce the value of private property. See *ANR Pipeline Co. v. 60 Acres of Land*, 418 F.Supp.2d 933, 943 (W.D. Mich. 2006); *Foster v. City of Detroit*, 254 F.Supp. 655 (E.D. Mich. 1966), aff'd, 405 F.2d 138 (6th Cir. 1968).

Obviously, not every diminution in property value resulting from a governmental entity's pre-condemnation activities is, or should be, compensable. See *Armstrong v. United States*, 364 U.S. 40, 48 (1960). Often, it takes years before government can move from public project planning into land acquisition by condemnation. During that time, notice that a taking is planned becomes widespread. Market activity within the affected area decreases. Few people are willing to buy or lease property that will be taken from them in the foreseeable future. As one witness testified in this case, "I don't know anybody that would be interested in buying property that a runway is going to be in your store the next day."

Such activities, when reasonable and necessary, are considered part of the burden of citizenship shared by each man in common with the other. See *Mitchell v. United States*, 267 U.S. 341 (1925); *United States v. Causby*, 328 U.S. 256 (1949). After all, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the

general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

However, overzealous government officials are – with more and more frequency – intentionally seeking to depress land values so the government can pay less than fair value when condemnation finally happens.[3] For example, in *Foster v. City of Detroit*, supra, 254 F.Supp. 655, the court held plaintiff's properties were taken without just compensation in violation of the requirements of the Fifth and Fourteenth Amendments because the city (like the City of San Diego in this case) actively facilitated the property's deterioration and diminution in value to acquire the property for less money in a condemnation proceeding. *Id.* at 662.

Whatever the subjective motivation of the government officials, the impact on the affected property owner is the same: a destructive effect on private property values, or even loss of the property itself (in foreclosure, as occurred here), due directly to government planning a future condemnation. See Kanner, *Condemnation Blight: Just*

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[3] A variety of governmental tools are frequently used in an attempt to "rig" the market in favor of government's enrichment of the public accounts at the expense of private property owners. See *Amen v. City of Dearborn*, 718 F.2d 789, 795 (6th Cir. 1983); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 274 (Tex. 1975); see also *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197-1200 (8th Cir. 1983) [city annexed land already zoned for industrial park purposes – and scheduled for private development – and then proceeded to change the property's preferred use designation); *Archer Gardens, Ltd. v. Brooklyn Ctr. Dev. Corp.*, 468 F.Supp. 609, 614 (S.D.N.Y. 1979) (the city and the city's designated redeveloper acted in concert to inhibit the private land owner's ability to lease, sell, or use its land, thereby creating a cash flow shortage leading to tax delinquencies and ultimately resulting in title forfeiture to the government).

How Just is Just Compensation?, supra, C730 ALI-ABA 219.

The time has come for a meaningful and comprehensive set of guidelines for determining the constitutional limits on the pre-condemnation conduct of local governmental bodies under the increasingly common circumstances of this case.

C. Specifically, Certiorari Should Be Granted to Clarify When The Harm Suffered By A Landowner As The Result Of A City's Pre-Condemnation Misconduct Is Sufficiently "Direct and Special" To Constitute A "Taking."

"Ordinarily, a taking of property occurs when a governmental body uses its eminent domain power to institute formal condemnation proceedings or when it physically appropriates property for public use." *Barsky v. City of Wilmington*, 578 F.Supp. 170, 172 (D.C. Del. 1983).

However, as noted above, when plans for government projects are announced and areas are designated for condemnation, "predictable changes occur in the neighborhoods to be appropriated. . . . Tenants depart the area, owners refuse to make improvements, property sales and rentals become difficult, and mortgage money becomes scarce. Whatever value the property may have had prior to public notice of a development project rapidly diminishes." *Id.* at 172.

In such cases, it is readily apparent that "landowners are in a practical sense 'deprived' of property well before the renewal program reaches their parcel." *Id.* In connection with the "trend toward finding an unconstitutional

taking without direct legal restraint or physical intrusion," the federal courts (and most state courts, including California) have looked for a way to ensure that owners in such circumstances recover "for real and actual losses resulting from governmental action even though that action falls short of a taking in the technical legal sense." *Thompson v. Tualatin Hills Park & Recreation Dist.*, supra, 496 F.Supp. at 541.

The plan the courts hit upon was the "direct and substantial" requirement. "To establish such a cause of action, there must be a direct and substantial interference with property rights caused by extraordinarily delayed condemnation proceedings or other unreasonable conduct on the part of the condemning authority." *Barsky v. City of Wilmington*, supra, 578 F.Supp. at 1703.

In *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), for example, the Ninth Circuit stated in an abandoned condemnation case, "When a public entity acting in furtherance of a public project ***directly and substantially*** interferes with property rights . . . , the result is a taking in the constitutional sense and compensation must be paid." *Id.* at 1330; see also *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979).

In *Selby Realty Co. v. City of San Buenaventura*, 10 Cal.3d 110 (1973), the California Supreme Court said, "In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must ***directly and specially*** affect the landowner to his injury." *Id.* at 119-120.

Likewise, in *Zumalt v. Boone County*, 921 S.W.2d 12 (Mo.Ct.App.1996), the Missouri court explained, "To state a claim for inverse condemnation, a plaintiff must allege his property was taken or damaged by the state for public use without just compensation. The landowner does not have to show an actual physical taking of property, but must plead and prove an invasion or an appropriation of some valuable property right which the landowner has to the legal and proper use of his property which invasion or appropriation ***directly and specially*** affects the landowner to his injury." *Id.* at 15.

In California, courts determine whether the pre-condemnation government conduct "***directly and specially***" injures the landowner by evaluating (1) the nature or extent of the government conduct (or misconduct); and (2) its impact on the landowner's use and enjoyment of the subject property. *Barthelemy v. Orange County Flood Control Dist.,* 65 Cal.App.4th 558, 565 (1988); *San Diego Metropolitan Transit Devel. Bd. v. Handlery Hotel,* 73 Cal.App.4th 517, 530-531 (1999); *Taper v. City of Long Beach,* 129 Cal.App.3d 590, 615 (1982); *Cambria Spring Co. v. City of Pico Rivera,* 171 Cal.App.3d 1080, 1091-1092 (1985); *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 58 Cal.App.4th 883, 900 (1997).

Likewise, federal courts considering taking claims in the context of discontinued acquisition plans also scrutinize (1) the propriety of the condemning authority's actions; and (2) the impact of those actions on the subject property. *Thompson v. Tualatin Hills Park & Recreation Dist.*, supra, 496 F.Supp. at 541. These cases have held "there must be a substantial burden on the property rights of the owner before a compensable taking can be found and the burden must be a product of governmental actions

that amount to abuse of the condemnation authority." *Id.*; see also *Sayre v. City of Cleveland*, 493 F.2d 64 (6th Cir. 1974); *Madison Realty Co. v. City of Detroit*, 315 F.Supp. 367 (E.D. Mich. 1970). "Absent delay or other unreasonable conduct amounting to an abuse of eminent domain authority, 'economic loss caused by renewal does not constitute a taking within the meaning of the Fifth and Fourteenth Amendments.'" *Barsky v. City of Wilmington*, supra, 578 F.Supp. at 1703.

As noted above, the California Court of Appeal in this case recognized, "In order to prevail on a claim of inverse condemnation, 'there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must ***directly and specially*** affect the landowner to his injury.'" (App. 11a) However, the court did not, as required by the Fifth and Fourteenth Amendments, scrutinize (1) the propriety of the condemning authority's actions; and (2) the impact of those actions on the subject property.

Instead, the California Court of Appeal held that to constitute "direct and special" harm, "the landowner's property must be 'singled out for singular and unique treatment' *in contrast to other landowners who could be affected by the proposed public work.*" (App. 11a) This blinks at reality, granting carte blanche power to public entities to take and take without ever paying at all. The notion that a taking which deprives two citizens of the value of their land, should somehow immunize the government against either of their claims is a throw back to sovereign immunity, without limits.

The California Court of Appeal decision thus violates the Fifth and Fourteenth Amendments in two ways:

First, the court did not even consider the extent or reprehensibility of the City's misconduct in this case. The most important factor in evaluating the constitutionality of a "taking" without direct legal restraint or physical intrusion, involves an examination of the "justice and fairness" of the governmental action. See *Andrus v. Allard*, 444 U.S. 51, 65 (1979). The City's conduct in this case was unjust and outrageous under any definition of those terms. Such conduct should not be condoned by the courts. It is the very definition of unconstitutional conduct by a governmental body.

Second, the court's opinion mistakenly assumes "the landowner's property must be 'singled out for singular and unique treatment' *in contrast to other landowners who could be affected by the proposed public work.*" However, "direct and special" harm was never intended to mean that the plaintiff property owner suffered harm that was different from others in the project footprint. Rather, "direct and special" harm means that the property owner suffers harm different and more severe than that of the *public at large, **outside** the project footprint.* There was never any question that this test was satisfied.

In determining whether a property owner is entitled to compensation for oppressive pre-condemnation conduct, the relevant comparison should be between the harm to the property owner as compared to that suffered by the ***public at large***. *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 332 (1883) [recognizing Fifth Amendment tak g in "claim of a private citizen for damages for any special inconvenience and discomfort not

experienced by the public at large"]; *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349.[4]

II. THE EXHAUSTION REQUIREMENT ENUNCIATED BY THIS COURT IN *WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION V. HAMILTON BANK OF JOHNSON* CREATES AN INSURMOUNTABLE OBSTACLE TO FEDERAL REVIEW OF BORDER'S FIFTH AND FOURTEENTH AMENDMENT CLAIMS.

As a general rule, "the Government of the United States [has] the right, under the Constitution, to protect a citizen in the exercise of his vested rights as an American citizen by . . . *the assertion of immediate jurisdiction through its courts. . . .*" *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 504 (1982). In particular, the Fourteenth Amendment installed the Federal Government "as a guarantor of the basic federal rights of individuals against incursions by state power." *Id.* at 503. In part, the installation of the federal courts as the champions of individual rights is based on the assumption that "federal courts would be less susceptible to local prejudice and to

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[4] In fact, *Hilltop Properties, Inc. v. State* (1970) 233 Cal.App.2d 349, the first case in California to require "direct and special harm" in these types of cases, cited *Hamer v. State Highway Commission*, 304 S.W.2d 869, 871 (Mo. 1957), in support of the proposition. *Hilltop Properties*, supra, 233 Cal.App.2d at 356. The *Hamer* case states when a landowner seeks damages for "taking" as a result of the Commission's announcement and then withdrawal of a proposal to construct a highway over his property, the landowner must show "he has sustained ***special damage with reference to his property, in excess of that sustained by the public generally.***" *Hamer*, supra, 304 S.W.2d at 871.

the existing defects in the fact-finding processes of the state courts." *Id.* at 506.

However, in cases of the type presented here, the Court requires a landowner (such as Border) seeking compensation for a "taking" by a local authority to first seek compensation through state procedures before pursuing relief in federal court. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, 473 U.S. 172, 194-195 (1985). Here, the local authorities intentionally "took" Border property and then the local courts refused to require payment of "just compensation" as guaranteed by the federal Constitution. In other words, the landowner must scale "two independent prudential hurdles" before bringing a takings claim against state entities in federal court. *Asociacion De Subscripcion Conjunta Del Seguro De Responsabilidad*, __ F.3d __ [2007 WL 613719] (1st Cir. 2007); citing *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734 (1997).

Recently, in *San Remo Hotel, L.P. v. City and County of San Francisco, Cal.*, 545 U.S. 323 (2005), Chief Justice Rehnquist, with whom Justice O'Connor, Justice Kennedy, and Justice Thomas joined, wrote the following in his concurring opinion:

> It is not clear to me that *Williamson County* was correct in demanding that, once a government entity has reached a final decision with respect to a claimant's property, the claimant must seek compensation in state court before bringing a federal takings claim in federal court. The Court in *Williamson County* purported to interpret the Fifth Amendment in divining this state-litigation requirement. . . . More recently, we have referred to it as merely a prudential requirement. *Suitum*

> *v. Tahoe Regional Planning Agency,* 520 U.S. 725, 733-734 (1997). It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before they can bring a federal takings claim. Cf. *Patsy v. Board of Regents of Fla.,* 457 U.S. 496, 516 (1982) (holding that plaintiffs suing under § 1983 are not required to have exhausted state administrative remedies). . . . *Id.* at 349.
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> * * *
>
> Finally, *Williamson County's* state-litigation rule has created some real anomalies, justifying our revisiting the issue. . . . *Id.* at 351.
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> I joined the opinion of the Court in *Williamson County.* But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . In an appropriate case, I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or local government entity must first seek compensation in state courts. *Id.* at 352.[5]

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[5] The holding in *Williamson County* that a federal takings claim is not ripe until the plaintiff has sought compensation through state procedures has also drawn substantial criticism from commentators. See also, e.g., J. David Breemer, "You Can Check Out But You Can Never Leave: The Story of *San Remo Hotel* – the Supreme Court Relegates Federal Takings Claims to State Courts Under A Rule Intended to Ripen the Claims for Federal Review," 33 B.C. Envtl. Aff. L.Rev. 247 (2006); Scott Keller, "Judicial Jurisdiction Stripping

(Continued on following page)

In this case, as a consequence of the Court's exhaustion requirement, federal court review of the "takings" issue in this case is completely unavailable until it can be presented for review by this Court. This limitation imposes an unworkable restriction on the ability of a property owner to obtain the basic protections our constitution guarantees to all of its citizens. Where local authorities are the architects of the constitutional deprivation, this requirement imposes a functional limitation upon protection of individual property rights against incursions by state power.

Border has now exhausted the procedures afforded it by the California state courts. The Court of Appeal and the State Supreme Court have now refused to allow the substantial jury verdict to stand, thereby depriving Border of any compensation whatsoever. Thus, rather than "just compensation," Border has been forced to litigate for a decade, and only now has the "right" to pursue the independence of the federal judiciary. As such, Border receives its *first chance* to seek Federal Constitutional protection in the procedural position it now finds itself, statistically unlikely to even obtain review by this court under writ of certiorari.

Such a result is not in the best interest of the citizens of the United States; nor is it consistent with role afforded the federal court system in protecting individual property rights against the abuses of local government. Border therefore urges this Court to grant review in this case to

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Masquerading as Ripeness: Eliminating the *Williamson County* State Litigation Requirements for Regulatory Takings Claims," 85 Tex. L.Rev. 199 (2006).

reconsider its decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson*, supra, 473 U.S. 172.

CONCLUSION

The Petition for Writ of certiorari should be granted.

Respectfully submitted,

DAVID B. CASSELMAN
WASSERMAN, COMDEN & CASSELMAN LLP
5567 Reseda Blvd., Suite 330
Tarzana, California 91356
(818) 705-6800

APPENDIX

142 Cal.App.4th 1538

Court of Appeal, Fourth District,
Division 2, California.

BORDER BUSINESS PARK, INC.,
Plaintiff and Appellant,

v.

CITY OF SAN DIEGO, Defendant and Appellant.
No. E035881.

Sept. 19, 2006.
Review Denied Jan. 3, 2007.

APPEAL from the Superior Court of San Diego County.[1] Vincent P. DiFiglia and Raymond J. Ikola, Judges.[2] Affirmed in part and reversed in part with directions.

McKenna Long & Aldridge, Niddrie, Fish & Buchanan, Michael H. Fish; Niddrie & Hegemier, David A. Niddrie, San Diego; Thorsnes, Bartolotta & McGuire, Vincent J. Bartolotta, Jr.; Wasserman, Comden, Casselman & Pearson, David B. Casselman, Tarzana; and Geoffrey C. Hazard, Jr., Philadelphia, PA, for Plaintiff and Appellant.

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[1] This appeal has been transferred from Division One to Division Two of this court pursuant to rule 47.1(b)(1)(B) of the California Rules of Court.

[2] Judge DiFiglia presided over the trial of this case but recused himself after the jury returned its verdict. Raymond J. Ikola, Judge of the Orange County Superior Court, was assigned by the Chief Justice, pursuant to article VI, section 6 of the California Constitution, to hear post-trial motions. On appeal, defendant City of San Diego challenges the sufficiency of the evidence to support the judgment. In its cross-appeal, plaintiff Border Business Park, Inc., challenges the partial grant of the city's motion for new trial on a cause of action for breach of contract.

Horvitz & Levy, Barry R. Levy, Lisa Perrochet, Curt Cutting, Encino; Latham & Watkins, Michael J. Weaver, San Diego, and Jared G. Flinn for Defendant and Appellant.

OPINION

McKINSTER, Acting P.J.

INTRODUCTION

The City of San Diego (the city) appeals a judgment for inverse condemnation awarding $65.3 million in damages to Border Business Park, Inc. (hereafter sometimes referred to as Border).

Border is a real estate development company which was developing a business park in Otay Mesa. Otay Mesa was then an unincorporated area in San Diego County adjacent to the Mexican border, and was later annexed by the city. Border asserted two causes of action for inverse condemnation. The first arose from the city's actions in connection with its announcements of a plan to create an international airport in Otay Mesa. Border contended that these announcements substantially interfered with sales of property within the business park and diminished the value of the property. The second inverse condemnation cause of action arose from the city's diversion of truck traffic, engendered by a newly opened crossing at the Mexican border, in a manner which allegedly interfered substantially with access to the business park.

The city asserts numerous grounds for reversal of the inverse condemnation judgment. Because we agree with the city's contention that the evidence was insufficient as a

matter of law to support a finding of inverse condemnation on both theories, we address only that issue.

Border cross-appeals from an order granting the city's motion for a new trial on Border's cause of action for breach of the development agreement it entered into with the city. It contends that the trial court erroneously found that damages which accrued before a certain date were time-barred. We affirm the order granting the city's motion for new trial.

FACTUAL AND PROCEDURAL BACKGROUND

Border Business Park, Inc. is one of numerous business entities owned by the De La Fuente family. The family business was founded by Roque De La Fuente, Sr., and his wife, Bertha Guerra De La Fuente, but is now controlled by their son, Roque De La Fuente II.[3] The trial court found that Mr. De La Fuente and the other De La Fuente family entities "are the alter ego of plaintiff Border Business Park, and of each other."

In 1983, the De La Fuentes purchased 312 acres of land in Otay Mesa, an unincorporated area in San Diego County adjacent to the Mexican border. 260 acres of the parcel they purchased were usable for development. The purchase was made through Border Business Park, Inc. Bertha Guerra De La Fuente was the sole shareholder, director, president and CEO of the corporation. Mr. De La Fuente managed the company through a corporation he owned, American International Enterprises.

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[3] References to "Mr. De La Fuente" are to Roque De La Fuente II.

In the early 1980's, the city became interested in annexing Otay Mesa. The area was then primarily raw land, but it included a small general aviation airport called Brown Field. In anticipation of annexation, the city created a community plan for Otay Mesa in 1981. The plan stated that a study by the San Diego Association of Governments (SANDAG), an association of local area governments, had identified Otay Mesa and Miramar Naval Air Station as "favored alternatives" for relocating San Diego's international airport, Lindbergh Field. The report recommended Otay Mesa as the "most likely" site for the new airport. In 1985, the city annexed Otay Mesa.

In 1986, the city entered into a development agreement with Border. The agreement provided that Border would pay certain fees and would bear the cost of various public improvements incident to the development of the business park. In return, the city agreed not to apply later-enacted rules or regulations to Border if they conflicted with laws in effect on the date of the agreement. The city also agreed not to hold Border responsible for revisions in certain types of fees or development standards, except under specified conditions.[4] To finance the development, the city provided Border with funds from municipal bonds, requiring Border to repay the bonds through periodic assessments over 20 years.

In 1988, SANDAG revisited the idea of locating an airport in Otay Mesa, which was still largely undeveloped. To preserve the status quo during the continued study, the

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[4] Because we affirm the order granting the city's motion for new trial on Border's cause of action for breach of the development agreement, we need not discuss the agreement or the alleged breaches.

city issued a one-year moratorium on certain types of development in Otay Mesa. The moratorium exempted portions of Otay Mesa for which the city had already issued development permits, including the property owned by Border. Subsequent moratoria were limited to residential development.

In 1989, SANDAG issued an updated report identifying Miramar and Otay Mesa as potential sites for a new airport. The city decided that Otay Mesa was a more viable site than Miramar. It also concluded that the Otay Mesa site would probably require the use of Mexican airspace. In 1991, the city passed a resolution stating that an international airport in Otay Mesa was the preferred option for a new airport. It designated it the "TwinPort" plan, referring to the creation of an international airport spanning the border, using the existing Brown Field in Otay Mesa and Rodriguez Field in Tijuana. However, the city did not inquire of the appropriate officials in Mexico to determine whether Mexico had an interest in such a plan, or whether Mexico would allow the use of its airspace for an airport built solely on the American side of the border. Two years later, the city was forced to abandon the Otay Mesa airport idea, upon belatedly discovering that Mexico was not interested in the plan and would not cooperate.

During the time that the city was pursuing the Otay Mesa airport plan, sales within Border Business Park fell off precipitously. Public announcements of the airport proposal, some of which showed possible configurations of the airport which would place runways directly through Border Business Park, caused potential buyers to look elsewhere. There was a nationwide recession at the time, but Border's sales fell off more than would be expected as a result of the recession. As a result of the drop in sales,

Border was unable to repay its bond obligations to the city. In 1993, the city brought a foreclosure action against 35 parcels within the business park. Border cross-complained for breach of the development agreement. Border was able to obtain financing and paid the delinquent assessments, although it remained obligated on outstanding penalties and other indebtedness. Border and the city agreed to a payment schedule. However, Border's financial difficulties continued, resulting in a judgment of foreclosure on some of its properties in 1995.[5]

Beginning in 1995, Border encountered further difficulties in selling properties within its business park as a result of the rerouting of truck traffic bound for the border crossing. In 1985, the federal government had opened a U.S.-Mexico border crossing in Otay Mesa. In 1993, the government closed the border crossing at San Ysidro to commercial truck traffic and routed all commercial truck traffic through the Otay Mesa border crossing instead. At the time, border-bound traffic was routed in such a way that it bypassed Border Business Park. In 1995, however, the city rerouted traffic in such a way that Border Business Park, which was located very near the truck crossing, was inundated with truck traffic. (Further details are discussed below.) Again, sales within the park suffered. In 1995, Border filed the present lawsuit, alleging breach of the development agreement. In 1996, Border filed for bankruptcy protection, and the breach of contract action was stayed. In 1998, the bankruptcy proceeding was dismissed, and proceedings resumed in the breach of

[5] Some of the properties were sold in foreclosure sales in 1997. However, most of them were repurchased by Mr. De La Fuente or by business entities owned by the De La Fuente family.

contract suit. Border amended its complaint to add the two causes of action for inverse condemnation.

The issue of inverse condemnation was tried to the court.[6] The court found that the city's airport announcements, made without having first ascertained that the government of Mexico would cooperate, were unreasonable and amounted to a taking. It also found that the diversion of truck traffic caused a compensable impairment of Border's access to its property. A jury awarded Border $25.5 million in damages resulting from the city's airport planning activities, and $39.8 million for the interference caused by the city's rerouting of truck traffic. The jury also found that the city breached the development agreement and awarded Border $29.2 million in damages. The trial court awarded Border $10.3 million in prejudgment interest for the airport planning claim and $16.1 million for the traffic routing claim.

The city filed a motion for judgment notwithstanding the verdict and a motion for new trial. The court denied the motion for judgment notwithstanding the verdict and granted the motion for new trial on the breach of contract claim only. The city filed a timely notice of appeal and Border filed a timely notice of cross-appeal.

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[6] Whether inverse condemnation occurred is decided by court trial, while damages are tried to a jury. (*Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1140, 268 Cal.Rptr. 559.)

DISCUSSION

THE AIRPORT INVERSE CONDEMNATION CLAIM

Border's inverse condemnation claim was based on the theory that the city acted unreasonably during the period it was considering developing the airport in Otay Mesa, because it failed to ascertain that Mexico either had an interest in developing the so-called TwinPort airport, i.e., a jointly operated airport situated on both sides of the California-Mexico border, or would permit the use of its airspace if the city developed an international airport solely on the California side of the border. The source of Border's theory of inverse condemnation is *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (*Klopping*).

Prior to *Klopping,* it was established that particularly oppressive acts by a public authority, involving a physical invasion or a direct legal restraint on the use of the property, could amount to a "de facto taking" of the property even without formal condemnation. (*Klopping, supra,* 8 Cal.3d at p. 46, 104 Cal.Rptr. 1, 500 P.2d 1345.) In *Klopping,* the court held that conduct falling short of a de facto taking can also result in liability. The court held that "when the condemner acts unreasonably in issuing pre-condemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property. . . . " (*Id.* at pp. 51-52, 104 Cal.Rptr. 1, 500 P.2d 1345.) In this case, the trial court found that the city's announcements concerning the

airport proposal were "reckless" and amounted to inverse condemnation pursuant to *Klopping*.

On appeal, the city contends that the evidence is insufficient to support the inverse condemnation judgment as a matter of law, because, in the absence of an announced intention to condemn a property, conduct which falls short of an "acquiring stage" of the condemnation process does not support a *Klopping* claim. The city also contends that the evidence does not support the necessary finding that Border suffered "distinct or unique injury" and that the evidence does not support a finding that its conduct was unreasonable. Border counters that substantial evidence supports the court's finding that the city's conduct was reckless, and contends that unreasonable conduct during the precondemnation period, as found by the trial court in this case, is a separate basis for liability under *Klopping*. It contends that it was not required to prove that the city moved beyond the planning phase into the acquisition phase in order to prevail on that theory.[7]

The city cites numerous cases which have held that an announced intention to acquire property or conduct which denotes an intent to acquire the property is essential to a *Klopping* claim. (*See, e.g., People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 355-356, 153 Cal.Rptr. 895; *Toso v. City of Santa Barbara* (1980) 101 Cal.App.3d 934, 965-957, 162 Cal.Rptr. 210; *Taper v. City of Long Beach* (1982) 129 Cal.App.3d 590, 615, 181 Cal.Rptr. 169; *Tilem v. City of Los Angeles* (1983)

[7] In the alternative, Border contends that the evidence shows that the city did reach the acquisition stage. Because we conclude that Border failed to meet its burden of proof on another element of the *Klopping* claim, we need not address that contention.

142 Cal.App.3d 694, 708-709, 191 Cal.Rptr. 229; *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, 864-867, 241 Cal.Rptr. 787.) We note, however, that the express language of *Klopping's* holding does not appear to require an announcement of an intent to condemn property, if liability is based on unreasonable conduct other than post-announcement delay. In *Klopping,* the court held that an action for inverse condemnation lies if the public agency acted improperly "*either* by unreasonably delaying eminent domain action *following an announcement of intent to condemn or* by other unreasonable conduct prior to condemnation." (*Klopping, supra,* 8 Cal.3d at p. 52, 104 Cal.Rptr. 1, 500 P.2d 1345, italics added.) In *Jones v. People ex rel. Dept. of Transportation* (1978) 22 Cal.3d 144, 148 Cal.Rptr. 640, 583 P.2d 165, the court declined to decide whether an announcement of an intent to condemn is essential to a *Klopping* claim because in that case a de facto taking occurred (*Jones v. People ex rel. Dept. of Transportation,* at p. 151, 148 Cal.Rptr. 640, 583 P.2d 165), and the court has not yet resolved this question. We need not decide the issue in this case, however, nor do we need to decide whether the city's conduct was unreasonable or oppressive within the meaning of *Klopping*, because Border failed to adduce any evidence that the city's announcements concerning the proposed Otay Mesa airport subjected it to direct and special injury.[8]

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[8] Border contends that because the city waived statement of decision, we must presume that the trial court found every fact necessary to support the judgment. Assuming that the absence of a statement of decision has any effect in this case (see discussion below), it merely requires us to review the record to determine whether there is substantial evidence to support the trial court's implied factual findings. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793, 218

(Continued on following page)

In order to prevail on a claim of inverse condemnation, "there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury." (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 119-120, 109 Cal.Rptr. 799, 514 P.2d 111.) The landowner's property must be "singled out for singular and unique treatment" in contrast to other landowners who could be affected by the proposed public work. (*Smith v. State of California* (1975) 50 Cal.App.3d 529, 537, 123 Cal.Rptr. 745.) "[T]he widespread impact resulting from mere general planning is noncompensable." (*People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc., supra,* 91 Cal.App.3d at p. 355, 153 Cal.Rptr. 895.) If the plaintiff's situation is "no different than that of any other landowner" in the area to be affected by the proposed plan, *Klopping* does not apply. (*Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d at p. 120, 109 Cal.Rptr. 799, 514 P.2d 111.)

Border produced no evidence that the airport proposal affected it in any unique manner. On the contrary, the undisputed evidence – adduced by Border itself – shows that the city's proposal concerning the airport affected owners of other business and industrial parks in Otay Mesa as well as Border, and in the same ways. Patrick Kennedy, an economist retained by Border to assess the economic impact of the city's alleged breaches of the development agreement, including the proposal to build

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Cal.Rptr. 39, 705 P.2d 362.) Our review of the record demonstrates that there is *no* evidence to support the essential finding that Border suffered a unique injury from the airport announcements.

the airport in Otay Mesa, testified that the SANDAG report, issued in May 1989, which described the proposal for the Otay Mesa airport, affected property values not just in Border Business Park but in other developments as well which were within the airport "footprint." There were 4,000 to 6,000 acres of industrial property within the footprint which would be affected. Border owned only 312 acres. Based on 17 real estate appraisal reports prepared for different properties in Otay Mesa during that period, Kennedy opined that the SANDAG report placed a cloud over the entire area.

In its opening statement, Border emphasized that the proposal showed a runway running "right across" its property. The SANDAG report did show that under at least one proposed configuration of the airport, some of the runways ran directly through Border Business Park. However, it showed runways running through other properties as well. Kennedy testified that the SANDAG report had a substantial impact "on anybody who's thinking about buying . . . in Border *or other parks that are underneath the runways.*" (Italics added.) Thus, Border was not subjected to any unique injury because of the proposed configuration of the runways.

Border contends that because neither party requested a statement of decision, we are limited to reviewing the judgment to determine whether there is substantial evidence to support the judgment on any theory, including its original claim, as alleged in the second amended complaint, that the city's entire course of conduct with respect to the breaches of the development agreement constituted inverse condemnation. Under that theory, Border contends, there is substantial evidence that it suffered special and unique damages. Border contends

that in the absence of a statement of decision, we cannot rely on the trial court's oral pronouncement of its ruling on the issue of liability to determine the legal theory on which the court based its decision.

Our review of the record persuades us that Border did not actually rely at trial on the theory of inverse condemnation as alleged in the second amended complaint. Rather, in its closing argument to the trial court on the issue of liability, Border asserted the *Klopping* theory with respect to the airport announcement and the impairment of access theory with respect to the traffic diversion. It did not assert its overarching theory that the city effected a taking by means of the series of breaches of the development agreement.

However, even if we assume, for the sake of argument, that Border did rely on the theory as alleged in the second amended complaint, we disagree that the absence of a statement of decision affects our review on appeal. The general rule is that in the absence of a statement of decision in a court trial, the reviewing court must conclude that the trial court made all findings necessary to support the judgment under any theory which was before the court. (*In re Marriage of Ditto* (1988) 206 Cal.App.3d 643, 646-648, 253 Cal.Rptr. 770; *Gray v. Gray* (1921) 185 Cal. 598, 599, 197 P. 945.) However, this rule is merely a corollary of the general rule that a judgment is presumed to be correct and must be upheld in the absence of an affirmative showing of error. This presumption applies only on a silent record. (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563, 194 Cal.Rptr. 773, 669 P.2d 9; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, 86 Cal.Rptr. 65, 468 P.2d 193.) In contrast, "When the record clearly demonstrates what the trial court did, we will not

presume it did something different." (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384, 46 Cal.Rptr.2d 542.) Thus, even in the absence of a statement of decision, we are not compelled to resort to a presumption if the record adequately demonstrates the legal theory the court applied. For example, in *In re Marriage of Powers* (1990) 218 Cal.App.3d 626, 267 Cal.Rptr. 350, the court held that because the reporter's transcript adequately set forth the basis for the trial court's ruling, the absence of a statement of decision was not fatal to the appeal. The court noted that in *In re Marriage of Ditto,* not only was there no statement of decision, the judgment did not explain the law the court applied or its reasoning, and there was no reporter's transcript. (*In re Marriage of Ditto, supra,* 206 Cal.App.3d at p. 649, fn. 5, 253 Cal.Rptr. 770.) Similarly, in *In re Marriage of Seaman & Menjou* (1991) 1 Cal.App.4th 1489, 2 Cal.Rptr.2d 690, the court held that the absence of a statement of decision was not fatal to the appeal because the judgment itself set forth the legal basis for the trial court's award of attorney fees. (*Id.* at p. 1494, fn. 3, 2 Cal.Rptr.2d 690.)

Here, the reporter's transcript shows that the court stated that it found the city liable for inverse condemnation based upon the city's unreasonable conduct in announcing the airport proposal without having first determined whether the Mexican government would cooperate and upon the impairment of access resulting from the traffic diversion. The court then instructed the jury to determine Border's damages, if any, based solely on those two theories. The court's statements plus the jury instructions foreclose any possibility that the court's finding of liability for inverse condemnation was based on any other legal

theory. Moreover, the jury's verdict awarding damages on the airport cause of action was unquestionably based solely on the *Klopping* theory; it was not instructed on any other theory. We cannot uphold the damage award on an alternative theory which was not submitted to the jury. (*McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1146, 29 Cal.Rptr.2d 559.)

Because there was no evidence that the airport proposal directly and specially affected Border, as opposed to the entire section of Otay Mesa within the proposed airport site, the airport inverse condemnation claim fails as a matter of law.

THE TRUCK TRAFFIC INVERSE CONDEMNATION CLAIM

An action for inverse condemnation can be based on substantial impairment of the right of ingress and egress, also known as the easement of access. (*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 663, 39 Cal.Rptr. 903, 394 P.2d 719.) In its second cause of action for inverse condemnation, Border alleged that the city substantially impaired access to Border Business Park by diverting truck traffic in such a way that the traffic backed up on the streets adjacent to the business park, making "ingress and egress to [its] property difficult or impossible" and "severely and substantially affect[ing] the marketability of the Business Park to prospective tenants."

Background

The issue arose as follows. Prior to the mid-1980's, the sole point of entry between the United States and Mexico in California was the border crossing at San Ysidro. In

about 1985, the federal government opened a second border crossing in Otay Mesa. In the mid-1990's, San Ysidro was closed to commercial truck traffic, and Otay Mesa became the sole border crossing for trucks. At that time, the main route to the border crossing was Otay Mesa Road, a city-operated street, which turned into State Highway 905 a few miles north of the border. Otay Mesa Road is the main thoroughfare in the area, and to avoid having long lines of traffic backed up along Otay Mesa Road as well as the commingling of truck and automobile traffic, the city decided to reroute truck traffic.

Choosing among the available alternatives, all of which presented problems, the city elected, as an interim solution, to route truck traffic from Otay Mesa Road south onto La Media, then east on Siempre Viva. It extended Drucker Road north to intersect with Siempre Viva and built a road to the border crossing. City traffic engineers anticipated that if the traffic backed up along Drucker Road and onto Siempre Viva, it would affect only the property on the south side of Siempre Viva, which was at that time largely undeveloped. Border Business Park is on the north side of Siempre Viva; La Media is immediately west of the park.[9]

When the city first decided to reroute the truck traffic, La Media was insufficiently developed to accommodate it. During the first six to nine months after the city routed

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[9] Both parties refer to maps which were produced by the city and inserted into its opening brief. The maps were not trial exhibits. Border inserted them into its brief as well, and adopts them to illustrate its arguments. It describes them as being generally accurate. For clarity, we have attached copies of representative maps to this opinion as an appendix.

truck traffic away from the Otay Mesa Road/Highway 905 route, it diverted the traffic through Border Business Park while it improved La Media. Even after La Media opened to truck traffic, some truck drivers continued to drive through the business park. Others continued to approach the border crossing from Otay Mesa Road/Highway 905 via the westbound lanes of Siempre Viva, turning left onto Drucker Road. However, in doing so, they cut into the queue of traffic which was lined up in eastbound lanes of Siempre Viva after having followed the designated route. Confrontations between truck drivers who had waited in line and those who had jumped the line ensued, including fistfights. The city installed concrete barriers called K-rails which prevented trucks from turning left onto Drucker Road from the westbound side of Siempre Viva. The city erected signs to direct the errant trucks back to La Media via the public roads which ran through Border Business Park. The K-rails alleviated the congestion at the intersection of Siempre Viva and Drucker Road, and also eliminated most of the backup in the westbound lane of Siempre Viva.

Traffic often backed up in the eastbound lanes of Siempre Viva to La Media, and sometimes up La Media as well. There was usually no traffic backup in the morning, but there was a backup every afternoon. It would sometimes begin as early as 1:00 p.m., but usually it would begin between 3:00 and 4:00 or 4:30. However, the backup usually abated after 5:00 p.m., when the border crossing closed.

The truck traffic caused noise and diesel fumes which affected the park. There was also some physical damage to the park. The congestion on the surrounding streets made it difficult for business owners and employees to enter and

exit the park. Sales of property in the park suffered as a result of the congestion.

The traffic problem was resolved after the trial, when, sometime in 2001, the city completed a permanent truck route to the border which had far less effect on traffic around the business park. Thus, Border sought damages for the period from January 1, 1995, the date the trial court found to be the effective date of the rerouting of truck traffic, through the trial in December 2000.

Standard of Review

We must first determine the applicable standard of review. Border takes the position that substantial impairment of access is solely a question of fact, and that we must uphold the trial court's finding of substantial impairment because there was testimony that the impact of the truck traffic was "both substantial and unnecessary" and that at times there was "total gridlock" on the streets surrounding the business park. The city contends that we can determine as a matter of law that there was no compensable impairment of access. It argues that inverse condemnation "may not be based on diminished convenience in the use of abutting streets, but only on proof of a 'substantial impairment' of access beyond a change in traffic flow or increased circuity of travel." However, it contends, the evidence shows that there was a means of access to the park at all times and that the traffic backup merely required the use of more circuitous routes at times to enter or leave the property.

The standard of review of this issue is in dispute among the courts. The California Supreme Court has held both that whether there is a substantial impairment of the

right of access is a question of fact (*Rose v. State of California* (1942) 19 Cal.2d 713, 728, 123 P.2d 505) and that it is a question of law (*Breidert v. Southern Pac. Co., supra,* 61 Cal.2d at p. 664, 39 Cal.Rptr. 903, 394 P.2d 719). It has not resolved the apparent discrepancy. In *San Diego Metropolitan Transit Development Bd. v. Price Co.* (1995) 37 Cal.App.4th 1541, 44 Cal.Rptr.2d 705, Division One of this court concluded that because the determination whether substantial impairment exists is primarily factual, the proper standard of review is substantial evidence. It concluded that the characterization of the issue of substantial impairment as one of law in some of the cases "means only that the compensability issue is a court issue and not a jury issue; the jury issue is limited to the amount of damages." (*Id.* at p. 1548, 44 Cal.Rptr.2d 705; accord, *Perrin v. Los Angeles County Transportation Com.* (1996) 42 Cal.App.4th 1807, 1812, 50 Cal.Rptr.2d 488.) However, in a case decided very shortly before *San Diego Metropolitan Transit Development Bd. v. Price Co., supra,* the Second District Court of Appeal held that "the initial question whether there has been a substantial impairment of access is in truth a mixed question of law and fact, decided predominately as a question of law." (*Brumer v. Los Angeles County Metropolitan Transportation Authority* (1995) 36 Cal.App.4th 1738, 1745, 43 Cal.Rptr.2d 314 (*Brumer*).)

We agree with the *Brumer* court. A mixed question of law and fact that is predominantly one of law is one which "'requires a critical consideration, in a factual context, of legal principles and their underlying values' rather than merely 'experience with human affairs.' [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860, 107 Cal.Rptr.2d 841, 24 P.3d 493.) As we discuss below, the

right of access is limited by well-defined legal principles, and the threshold question – whether there has been an impairment of that right – is primarily a legal one, in that it requires consideration of legal principles "in the mix of fact and law." (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801, 35 Cal.Rptr.2d 418, 883 P.2d 960.) The more fact-driven inquiry, whether any impairment which has occurred is sufficiently substantial to be actionable (*Brumer, supra,* 36 Cal.App.4th at p. 1745, 43 Cal.Rptr.2d 314), arises only if there has been a legally cognizable impairment of the right of access. (See *Breidert v. Southern Pac. Co., supra,* 61 Cal.2d at p. 665, 39 Cal.Rptr. 903, 394 P.2d 719 [lack of access to the next intersecting street is a factor in finding impairment of the "general right" of access].) The issue is thus a mixed question in which legal considerations predominate, at least at the threshold.

In reviewing a mixed question of law and fact, we defer to the express or implied factual findings of the trial court and determine the applicable legal principles de novo. The standard which applies to the third step of the analysis, applying the law to the facts, depends upon whether factual or legal issues predominate. Where, as in this case, the issue is predominately one of law, we review it de novo. (*Ghirardo v. Antonioli, supra,* 8 Cal.4th at pp. 800-801, 35 Cal.Rptr.2d 418, 883 P.2d 960.)

The Evidence Is Insufficient as a Matter of Law to Support the Inverse Condemnation Claim

As noted above, the easement of access "consists of the right to get into the street upon which the landowner's property abuts and from there, in a reasonable manner, to the general system of public streets." (*Breidert v. Southern Pac. Co., supra,* 61 Cal.2d at p. 663, 39 Cal.Rptr. 903, 394

P.2d 719.) The city correctly points out that street alterations which cause significantly increased traffic or which reduce but do not eliminate access to a property do not give rise to a compensable taking. (*People v. Ayon* (1960) 54 Cal.2d 217, 223-224, 5 Cal.Rptr. 151, 352 P.2d 519; *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152, 167, 24 Cal.Rptr.2d 607.) Here, however, Border does not allege that there was merely an increase of traffic which caused some inconvenience or which reduced access to its property. Rather, Border contends that there was "total gridlock," both around the property and within it, which rendered ingress and egress virtually nonexistent.

Although we have found no cases with a similar factual situation, we will assume, for the sake of discussion, that a rerouting of traffic which caused gridlock for a period of several hours every day would constitute a substantial impairment of the right of access. However, "gridlock" denotes more than heavy or slow-moving traffic. Rather, it denotes traffic congestion on a grid of intersecting streets which prevents traffic from moving in any direction. (Webster's 9th New Collegiate Dict. (1991) p. 537.) Here, there is no evidence which supports Border's contention that there was gridlock which prevented all access to the business park.

First, there is no evidence that the truck traffic "often comes to a complete stop in *both directions*" (original italics) on Siempre Viva, as Border claims. The exhibits it refers to show traffic backed up on Siempre Viva and La

Media only, and in only one direction on either street.[10] Border claims that Richard Schaaf, a city traffic officer, testified that traffic was often blocked in both directions on Siempre Viva. This is not true. Rather, Officer Schaaf testified that the backup normally affected only the eastbound lanes. Occasionally, he said, a truck attempting to make an illegal turn would block all three lanes of Siempre Viva. When that happened, though, he would direct the truck out of the lane, make it go to a safe area, issue a citation, and send it eastbound. Thus, any blockage would be transitory and would not result in gridlock.

Rene Romero, the second witness Border cites, did not say that traffic often comes to a complete stop in both directions on Siempre Viva. Mr. Romero testified that when the trucks are backed up, it is impossible to drive through in the eastbound lane. He testified that driving in the opposite direction is hazardous because the truck drivers get impatient and some will enter the lane for oncoming traffic – i.e., the westbound lane – to try to pass other trucks in the queue. Thus, he did not say that it was impossible to drive westbound on Siempre Viva because of gridlock, but rather that it was hazardous to do so because of trucks driving eastbound in the westbound lane.

There is also no evidence that traffic ever encircled the business park, as Border claims. The park is bounded on the north by Airway Road, on the east by Harvest Road, on the south by the westbound lane of Siempre Viva and

[10] We decline Border's requests that we watch a videotape it has provided as part of the respondent's appendix. The videotape was not admitted into evidence during the trial and was not shown to the court or to the jury.

on the west by the northbound lane of La Media. There is no testimony that traffic backed up on all of these streets.

Nor is there evidence that there was ever gridlock on any of the streets surrounding the park, except, for a short period of time, at Siempre Viva and Drucker Road. Before the city installed the K-rails, traffic attempting to turn onto Drucker Road from both directions on Siempre Viva apparently caused periods of true gridlock at that intersection. However, the business park has entrance and exit roads intersecting with city streets on all four sides of the park. There is no evidence of gridlock on any of the streets except Siempre Viva, and on Siempre Viva, the only point of gridlock was the intersection with Drucker Road. Gridlock at a single intersection does not amount to "total gridlock" on all the streets surrounding the business park.

There is also no evidence to support Border's claim that there was solid gridlock within the park every day and that drivers would jump the curbs inside the park "or otherwise proceed onto the private property of Park tenants" or "*make their own dirt roads in the Park* to avoid the queue on the paved streets." (Original italics.) Officer Schaaf testified that trucks used the business park to make U-turns, as well as using "other dirt lots" in the vicinity. However, he did not identify those lots as being within the park, as Border implies. There was property west of La Media and south of Siempre Viva, not owned by Border, which consisted of dirt lots. The officer also testified that he had occasionally investigated damage to private property within the park allegedly caused by trucks, but he did not describe the nature of the damage he saw, nor did he say that any such damage was ever determined to have been caused by trucks. And, he did not testify either directly or by implication that trucks "made

their own dirt roads" within the park, as Border claims, nor did he testify that he observed gridlock within the park. Harry Otis, a business owner with property in the park, did not testify that truck drivers drove off the paved roads to avoid gridlock, as Border asserts. Rather, he testified that on some occasions *he* used "cross-country tactics to get off the roads" and would "go around" to gain access to his property.

Border cites no other evidence that truck traffic created gridlock within the park or resembled a "serpentine waiting line at a Disneyland ride." Even Mr. De La Fuente did not describe anything approaching gridlock. Rather, he said that during the time La Media was being improved, there was a daily line of trucks which "snaked" through the park. He made it clear, moreover, that the most serious problems with truck traffic within the park persisted only for a period of six to nine months while the city improved La Media to accommodate truck traffic. Border sought damages for six *years* of impaired access – from January 1, 1995, the date the court found to be the effective date of the traffic rerouting, through the trial in December 2000.

Taken as a whole, and even when viewed in the light most favorable to Border, the evidence fails to establish that the truck traffic ever completely prevented ingress or egress. The question thus becomes whether the evidence supports the conclusion reached by the trial court, that the traffic problems amounted to a substantial impairment of the right of access. We conclude that as a matter of law, the evidence does not support a finding of compensable interference with the right of access.

The right of access is not unlimited. "Not every interference with the property owner's access to the street upon which his property abuts and not every impairment of access, as such, to the general system of public streets constitutes a taking which entitles him to compensation." (*Breidert v. Southern Pac. Co., supra,* 61 Cal.2d at pp. 663-664, 39 Cal.Rptr. 903, 394 P.2d 719.) As long as there is access to the abutting road and from there to the next intersecting street in at least one direction, there is no legally cognizable impairment of access. (*People v. Ayon, supra,* 54 Cal.2d at pp. 223-224, 5 Cal.Rptr. 151, 352 P.2d 519.)

The maps Border relies upon show that there was access by a number of routes from the business park's six entrance/exit roads to the general system of streets. There is a network of roads within the park which provide access from most of the parcels to all of the entrance/exit roads. There is an exit which intersects the northbound lane of La Media, as well as two exits which lead to Airway Road, which also intersects the northbound lane of La Media. La Media intersects Otay Mesa Road to the north of the park. Otay Mesa Road apparently intersects Interstate 805, and is apparently the main thoroughfare in the area. There was no evidence that the traffic backup affected the northbound lanes of La Media. The only evidence that traffic backed up in the southbound lane of La Media as far north as Airway Road, limiting access via the La Media entrance, is the testimony of Harry Otis, who owned property within the business park. Mr. Otis testified that sometimes, rather than using the La Media entrance to the park, he would instead have to come down Highway 905 to Airway Road and enter the park via Airway Road. However, he did not indicate that there was ever a time

when he was unable to gain access via Airway Road.[11] Thus, the evidence fails to show that there was ever a time when there was no access by means of at least one entrance to the park. At most, the traffic backups required tenants of the park to use an entrance which was less convenient.[12] Interference with access which merely requires greater "circuity of travel" is not compensable. (*People v. Russell* (1957) 48 Cal.2d 189, 195, 309 P.2d 10.)

There are a few parcels within the business park which have no access to the streets within the park, such as several which front on Siempre Viva. Their means of ingress and egress is apparently limited to driveways which lead directly into the westbound lane of Siempre Viva. Border attempted to show that those properties completely lacked a means of ingress and egress because

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[11] In closing argument, Border's attorney asserted that Mr. Otis testified that there was sometimes traffic encircling the park, resulting in gridlock and an inability to enter the park. We are unable to discern the basis for this assertion from the transcript of Mr. Otis's testimony.

[12] Mr. Otis testified that on some occasions, he had to use "cross-county tactics to get off the roads and actually go to the outside and go around" to gain entry to the park when access was blocked in one direction and he had to "wait" to gain access from another direction. The meaning of the testimony about going "to the outside" and going "around" is unclear. However, it is clear that he did have access to his property from Airway Road. Rene Romero, another owner of property within the park, said that at times it was impossible to drive through on the eastbound lanes of Siempre Viva, but he did not testify that he was ever unable to reach his property by an alternate route. John Mawhinney, a real estate appraiser who testified for Border as to the effect the traffic had on sales within the park, testified that the two- to three-hour period of "gridlock" required "a certain amount of circuity of travel" for tenants and vendors and thus inconvenienced them. He did not testify that he had ever observed or that anyone had ever told him that tenants or vendors were ever completely unable to enter or exit the park.

of the traffic problems on Siempre Viva. This was refuted by Officer Schaaf, who rejected the suggestion made by Border's attorney that the traffic backup on Siempre Viva "covers" the entrances and exits to the business park. The maps relied on by both parties make it clear that even when the traffic was backed up in the eastbound lanes of Siempre Viva, the properties in question would have access to the westbound lane. A driver leaving those properties could travel west to La Media and thence north to Otay Mesa Road. Even during the relatively short period when there was gridlock at Siempre Viva and Drucker Road, before the city installed the K-rails, the gridlock would not have affected egress from those properties which lie to the west of Drucker Road.[13] Ingress to those properties could be achieved, even when there was gridlock to the west of Drucker Road, by traveling through the business park from the north and exiting into the westbound lane of Siempre Viva either at Drucker Road or via the exit road to the west of Drucker Road. The properties along Siempre Viva which lie to the east of Drucker Road have access to other routes for both ingress and egress, either by driving through the park to Airway Road or by using Harvest Road. Thus, even though access might have been circuitous and perhaps slow because of the volume of traffic, there was nevertheless a reasonable means of ingress and egress at all times.

Border asserts that courts "have imposed liability where, as here, there is unnecessary and substantial traffic diversion," but cites no cases which have actually

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[13] The court found that the city rerouted the traffic effective January 1, 1995. Officer Schaaf testified that the K-rails were installed sometime in 1995 or 1996.

held that a city can be liable for rerouting of traffic which results in less than a complete denial of access. Border cites only *Heimann v. City of Los Angeles* (1947) 30 Cal.2d 746, 185 P.2d 597.[14] however, there was no allegation IN THAT CASE THAT ANY DAMAGES resulted from traffic diversion. Rather, the issue in that case was an alleged loss of use of property during the construction of a viaduct, resulting from the piling of earth, rock and other material in the streets and the erection of sawmills, sheds and other structures, the accumulation of waste materials on and near the plaintiffs' premises and the partial obstruction and closing of streets. (*Id.* at pp. 754-755, 185 P.2d 597.) In contrast, the courts have held that exercise of a city's power to regulate traffic is not actionable under a theory of impairment of access: "The property owner has no constitutional right to compensation simply because the streets upon which his property abuts are improved so as to affect the traffic flow on such streets. If loss of business or of value of the property results, that is noncompensable. It is simply a risk the property owner assumes when he lives in modern society under modern traffic conditions." (*People v. Ayon, supra,* 54 Cal.2d at pp. 223-224, 5 Cal.Rptr. 151, 352 P.2d 519.) If some reasonable means of access remains, even if it is impeded by heavy traffic, there has been no compensable impairment of the right of access. (*Friends of H Street v. City of Sacramento, supra,*

[14] Border also claims that the city's traffic engineer testified that the impact of the truck traffic on the business park was "both substantial and unnecessary." We find no such testimony. Rather, on the reporter's transcript page cited by Border, the city traffic engineer testified that the city was aware that the border-bound truck traffic would cause problems regardless of the route it chose. Elsewhere, he explained that the city chose the route it did because it expected it to cause the least disruption of any of the routes available to it.

20 Cal.App.4th at p. 167, 24 Cal.Rptr.2d 607; *People ex rel. Dept. of Public Works v. Wasserman* (1966) 240 Cal.App.2d 716, 730, 50 Cal.Rptr. 95.)[15]

We next address Border's claim that the judgment can be affirmed on the alternate theory, which it asserted at trial, that the noise, dust and fumes generated by the idling trucks was "not far removed from a direct physical intrusion" or that it amounted to a nuisance.[16] This argument fails because the case was not submitted to the jury on that theory. Rather, the trial court instructed the jury that it had determined that the diversion of truck traffic amounted to a partial or temporary taking of the property, and that Border's right of access to the property had been impaired as a result of the city's actions in routing traffic to the border crossing. It instructed the jury to determine extent, if any, to which Border's property had been decreased in value by reason of the impairment of access.

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[15] Border contends that *Rose v. State of California, supra,* 19 Cal.2d 713, 123 P.2d 505 compels the conclusion that access was substantially impaired and thus compensable. It contends that in *Rose,* construction which resulted in narrowing the road fronting the plaintiff's property was deemed to be a substantial impairment of the right of access. However, in *Rose,* the narrowing of the road did not substantially impair the right of access for the use to which the property was then being put. The property was then in use as an orchard or farm, including a residence. However, it was zoned industrial. The narrowing of the road resulted in frontage which was not wide enough for two trucks to pass in opposite directions. It thus rendered the property completely unusable for any "large industrial use" and therefore diminished the property's market value. (*Id.* at pp. 718, 734, 735-736, 123 P.2d 505.) Here, in contrast, the record shows only that ingress and egress became more difficult and more circuitous for a few hours each day, and only temporarily. The situation in *Rose* is not analogous.

[16] The source of this theory is *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 713, 66 Cal.Rptr.2d 630, 941 P.2d 809.

That was the sole basis upon which the court instructed the jury with respect to damages resulting from the diversion of traffic; it did not instruct the jury on the nuisance theory. We cannot uphold a judgment on the basis of a legal theory which was not submitted to the jury. (*McLaughlin v. National Union Fire Ins. Co., supra,* 23 Cal.App.4th at p. 1146, 29 Cal.Rptr.2d 559.)

Because the evidence does not support the judgment of inverse condemnation based on the traffic diversion as a matter of law, we will reverse the judgment on that cause of action as well.

THE CITY'S MOTION FOR NEW TRIAL WAS PROPERLY GRANTED

Introduction

In its cross-appeal, Border asserts that the trial court erred in granting the city's motion for a new trial on Border's breach of contract claim. Border contends that the court erroneously concluded that the doctrine of res judicata barred recovery for any breach which occurred before June 23, 1994, because the court was operating under the mistaken belief that there was a final judgment in a prior lawsuit between the parties. In the prior action, the court sustained without leave to amend the city's demurrer to Border's cross-complaint, in which it asserted the same breach of contract claims it asserted in this case. However, no judgment of dismissal was filed. Border asserts that the order sustaining the demurrer is not a final judgment and has no res judicata effect. Therefore, Border contends that we should reverse the order granting the city a new trial on the breach of contract claim.

The parties devote considerable argument to whether the court applied res judicata, as it stated in its ruling, or in reality applied collateral estoppel. The distinction between the two doctrines is significant because res judicata requires a final judgment, while an adjudication which is not a final judgment may, under some circumstances, be given preclusive effect under the doctrine of collateral estoppel. It is undisputed that there was no judgment entered in the prior lawsuit.[17] Border contends that the distinction is significant as well because collateral estoppel applies only to issues which were actually litigated, while res judicata applies to matters which were raised as well as to matters which could have been raised. It points out that the trial court expressly stated that it was not applying collateral estoppel but res judicata, because the effect of its ruling was to preclude relitigation of some issues which were not actually litigated in the demurrer in the prior action. It argues that the court's determination of the new trial motion cannot be sustained because there is unquestionably no final judgment which satisfies the requirements of res judicata.

We need not determine whether the court correctly described the doctrine it applied to determine that relitigation of the specified issues was precluded, nor whether it applied the doctrine correctly. As Border correctly posits, the order granting the new trial is subject to our independent review.[18] Under that standard, we decide a legal

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[17] Both the underlying facts and the legal issues are discussed in detail below.

[18] An order granting a new trial is normally reviewed for abuse of discretion. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 859, 107 Cal.Rptr.2d 841, 24 P.3d 493.) However, "any determination underlying any order is scrutinized under the test appropriate to [that]

(Continued on following page)

issue without regard to the trial court's analysis. (*Ghirardo v. Antonioli*, *supra*, 8 Cal.4th at p. 799, 35 Cal.Rptr.2d 418, 883 P.2d 960.) We review the court's ruling, not its reasoning, and we will uphold its ruling if it is correct on any theory of law applicable to the case. (*People v. Zapien* (1993) 4 Cal.4th 929, 976, 17 Cal.Rptr.2d 122, 846 P.2d 704.)

Background

The issue arose as follows. In 1994, the city filed an action against Border to foreclose on assessment district liens. (*City of San Diego v. De La Fuente Business Park, Inc.* (Super. Ct. San Diego County, 1995, No. 676625).)[19] (The parties refer to this case as "De La Fuente II.") Border filed a cross-complaint alleging breach of the development agreement. The city obtained an order severing the cross-complaint from the foreclosure action. In February 1995, the city obtained a judgment in the foreclosure action. It then filed a demurrer to the cross-complaint on grounds that the cross-complaint failed to allege compliance with the claim presentation requirements of Government Code section 910 et seq., which the

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determination." (*Ibid.*) If a motion for new trial depends upon the resolution of a question of law, we review the order granting the motion de novo. (*Ibid.*) Here, the new trial motion depends on the applicability of res judicata or collateral estoppel. Both are questions of law which are reviewed independently. (*Roos v. Red* (2005) 130 Cal.App.4th 870, 878, 30 Cal.Rptr.3d 446; *Allstate Ins. Co. v. Mel Rapton, Inc.* (2000) 77 Cal.App.4th 901, 907, 92 Cal.Rptr.2d 151.) Therefore, we review the basis for the new trial order independently.

[19] Border Business Park changed its name to De La Fuente Business Park in 1987 and then changed its name back to Border Business Park in 1997.

city contended was a prerequisite to the cross-complaint. Border opposed the demurrer, but after a hearing the demurrer was granted without leave to amend based on noncompliance with Government Code section 910 et seq. In May 1995, the court issued a minute order stating its ruling, but no judgment of dismissal was filed.

On June 23, 1995, Border presented a Government Code claim to the city asserting breach of the development agreement. The city denied the claim, and on September 22, 1995, Border filed the instant action, again alleging breach of the development agreement.

The city filed a motion in limine to exclude evidence of and damages for alleged breaches which occurred more than one year before June 23, 1995, the date Border filed its Government Code claim, arguing that any such breaches were time-barred.[20] It also argued that because the issue was decided adversely to Border in the prior case, Border was estopped from denying that the Government Claims Act applied. The city erroneously asserted that the order sustaining the demurrer had been reduced to a final judgment on the merits.

The trial court denied the motion in limine, and the breach of contract cause of action was submitted to the

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[20] Government Code section 905 provides that all claims for money or damages against a local public agency (with exceptions not pertinent here) must be presented in accordance with the claims procedures set forth elsewhere. Government Code section 911.2, subdivision (a), provides that all claims other than a claim relating to a cause of action for death or injury to person or property shall be presented no later than one year after the accrual of the cause of action. Claims arising more than one year prior to presentation of the claim are barred. (*Utility Audit Co. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 960-961, 5 Cal.Rptr.3d 520.)

jury based on evidence of breaches of the development agreement which occurred both before and after June 23, 1994. The jury found the city liable for breach of the agreement and awarded Border $29 million in damages. The verdict did not apportion the damages with respect to any particular alleged breach or breaches.

The city filed a motion for judgment notwithstanding the verdict and a motion for new trial. The trial court rejected the city's argument that the entire breach of contract claim was barred by application of res judicata. However, it held that the ruling on the demurrer in the prior action conclusively established that Border had not filed a Government Code claim up to the time it filed its cross-complaint in that action. It also held that Border's assertions that a Government Code claim was not required or that compliance with the claim requirement was waived or excused under any theory was conclusively adjudicated adversely to Border in the prior proceeding because Border could have raised those contentions in its opposition to the demurrer, but did not do so. As a result, the court held that the prior ruling established that any breach which occurred more than one year before Border filed its Government Code claim – i.e., any breach which occurred before June 23, 1994 – was time-barred. The court granted a new trial on both liability and damages, excluding breaches which occurred before June 23, 1994.

Direct or Collateral Estoppel Precludes Relitigation of Issues Which Were Finally Adjudicated in a Prior Proceeding Between the Same Parties

"Res judicata prohibits the relitigation of claims and issues which have already been adjudicated in an earlier proceeding. The doctrine has two components. '"In its

primary aspect the doctrine of res judicata [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action." . . . The secondary aspect is "collateral estoppel" or "issue preclusion," which does not bar a second action but "precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding.'" [Citations.]" (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335, 79 Cal.Rptr.2d 763.)

When issue preclusion arises from successive suits on different claims, it is referred to as collateral estoppel. If, as in this case, the second action is on the same claim, issue preclusion based on the earlier determination is described as direct estoppel. (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 997, 76 Cal.Rptr.2d 882; Rest.2d Judgments, § 17, com. c, pp. 149-150; Rest.2d Judgments, § 27, com. b, pp. 251-252.) Both collateral and direct estoppel have the "'dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.' [Citation.]" (*Sabek, Inc. v. Engelhard Corp.*, at p. 997, 76 Cal.Rptr.2d 882.)

Here, the trial court precluded only relitigation of specified issues; it did not bar relitigation of Border's breach of contract claim in its entirety, but limited the scope of the claim to damages which accrued after a certain date. The question we address, therefore, is whether the prior lawsuit precludes relitigation of those

issues. If it does, we must uphold the order granting the new trial.[21]

The Order Sustaining the Demurrer in the Prior Action Is a Final Judgment for Purposes of Issue Preclusion

It is undisputed that no judgment was entered in the prior lawsuit, and Border contends that the order sustaining the demurrer is insufficient to constitute a final judgment. However, for purposes of issue preclusion, as opposed to res judicata, "'final judgment' includes *any* prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." (Rest.2d Judgments, § 13, italics added; *see Sabek, Inc. v. Engelhard Corp.*, *supra*, 65 Cal.App.4th at p. 998, 76 Cal.Rptr.2d 882; *Sandoval v. Superior Court* (1983) 140 Cal.App.3d 932, 936, 190 Cal.Rptr. 29.)

The city cites two cases in which an order, rather than a judgment, was found sufficiently final for purposes of issue preclusion.[22] In *Rymer v. Hagler* (1989) 211

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[21] Border contends that because the order granting new trial was based on the ground that damages were excessive, the order cannot be affirmed except on that ground, and then only if there is "no substantial basis" for the determination that damages were excessive. The order granting new trial was based on the ground that damages were excessive because the trial court erred as a matter of law by failing to accept as conclusive the ruling in a prior lawsuit that damages which accrued before June 23, 1994, were barred by the statute of limitations. If the prior lawsuit did operate as a bar to Border's claim for damages which accrued before that date, damages were excessive as a matter of law, to the extent that they were based on the time-barred breaches.

[22] The other cases it cites in which this "lesser" finality rule was applied all involve judgments – either a judgment which was arguably nullified by settlement and dismissal of an appeal (*Sandoval v. Superior Court, supra,* 140 Cal.App.3d at pp. 936-940, 190 Cal.Rptr. 29;

(Continued on following page)

Cal.App.3d 1171, 260 Cal.Rptr. 76, the court held that a determination of coverage by a Workers' Compensation Appeals Board judge was sufficiently final to preclude relitigation of the same issue in a civil proceeding based on the same industrial injury which was the subject of the workers' compensation claim. The court reasoned that the order was a final order within the meaning of Labor Code section 5900, subdivision (a), and that deeming it a final judgment for purposes of issue preclusion served the policy underlying the doctrine of issue preclusion, i.e., protecting parties from endless litigation. (*Rymer v. Hagler,* at pp. 1180-1181, 260 Cal.Rptr. 76.) Similarly, in *Security People, Inc. v. Medeco Security Locks, Inc.* (N.D.Cal.1999) 59 F.Supp.2d 1040, the federal district court held that a disposition by summary judgment "is a decision on the merits, and it is as final and conclusive as a judgment after trial" for purposes of issue preclusion, even though the ruling was later vacated pursuant to a settlement. (*Id.* at p. 1045.) In addition, we note that courts of both this state and others have held that an arbitration award has collateral estoppel effect, "so long as the arbitration had the elements of an adjudicatory procedure." (*Kelly v. Vons Companies, Inc., supra,* 67 Cal.App.4th at p. 1336, 79 Cal.Rptr.2d 763.)

Border cites *Service Employees International Union v. Hollywood Park, Inc.* (1983) 149 Cal.App.3d 745, 197 Cal.Rptr. 316, which holds that an order sustaining a

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Stonewall Ins. Co. v. City of Palos Verdes Estates (1996) 46 Cal.App.4th 1810, 1840, 54 Cal.Rptr.2d 176), or a judgment which was not on the merits but nevertheless conclusive on the issue sought to be relitigated. (*Sabek, Inc. v. Engelhard Corp., supra,* 65 Cal.App.4th at p. 998, 76 Cal.Rptr.2d 882.)

demurrer is not a final judgment for purposes of res judicata. (*Id.* at p. 756, 197 Cal.Rptr. 316.) However, *Service Employees International Union v. Hollywood Park, Inc.* involves claim preclusion rather than issue preclusion, and it therefore does not address the question whether an order sustaining a demurrer on substantive grounds can be deemed a final judgment for purposes of issue preclusion.

A prior adjudication of an issue in another action may be deemed "sufficiently firm" to be accorded preclusive effect based on the following factors: (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal. (*Sandoval v. Superior Court*, *supra*, 140 Cal.App.3d at p. 936, 190 Cal.Rptr. 29; Rest.2d Judgments, § 13, com. g.) Here, the applicability of the Government Claims Act to the breach of contract claim was litigated in connection with the demurrer in the prior lawsuit, and the court issued an order, which was in no way tentative, sustaining the demurrer and stating the basis for its decision. If Border had wished to challenge the ruling, it could have requested entry of judgment and appealed the dismissal of its cross-complaint. Thus, the order sustaining the demurrer meets the criteria for a final judgment for purposes of issue preclusion. (*Sandoval v. Superior Court*, at p. 936, 190 Cal.Rptr. 29.) Moreover, Border effectively acquiesced in the ruling by failing to obtain a final judgment and filing an appeal and instead promptly presenting a Government Code claim asserting the breach of contract claim. Having decided not to pursue the remedy available to it, it should not now be able to contend that the order is not a final adjudication of the

issues it addressed. Under these circumstances, the order sustaining the demurrer precludes relitigation of the issues already adjudicated.

Border now seeks a ruling that breaches which occurred before June 23, 1994, were not time-barred, based on theories which it did not assert in its opposition to the demurrer. It contends that the development agreement contained an express waiver of any statute of limitations and eliminated the requirement for filing a Government Code claim; that because the development agreement is an executory contract, Border could wait until December 31, 2007, the end of contractual period, to file any claim for breach of the agreement; and that the claim is timely under the doctrine of continuing wrongs.

Issue preclusion bars relitigation of any issue which was actually litigated in the prior proceeding. (*Kelly v. Vons Companies, Inc.*, *supra*, 67 Cal.App.4th at p. 1339, 79 Cal.Rptr.2d 763.) For purposes of issue preclusion, however, an "issue" includes any legal theory or factual matter which could have been asserted in support of or in opposition to the issue which was litigated. (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202, 99 P.2d 652.) "'Despite the established principle that the estoppel results only on *issues actually litigated*, it is often said that a judgment is binding as to all *matters* which were raised or *which might have been raised.* [Citation.] Is this latter statement incorrect as applied to subsequent suits on a different cause of action? The conflict appears to be largely one of expression, and it may be resolved if "issues" is given a reasonable meaning. Clearly a former judgment is not a collateral estoppel on *issues which might have been raised but were not*; just as clearly it is a collateral estoppel on issues which were raised, *even though some*

factual matters or legal arguments which could have been presented were not.' (3 Witkin, Cal. Procedure [former], § 63, p. 1949.)" (*Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 429, 95 Cal.Rptr. 860, original italics.)[23] Any of the contentions Border now asserts could have been raised in its opposition to the demurrer. The order sustaining the demurrer therefore precludes consideration of those contentions at this juncture.

THE CITY'S REQUEST FOR JUDICIAL NOTICE

On February 17, 2006, the city filed a request that we take judicial notice of documents filed in two cases now pending in the Superior Court of San Diego County, *National Enterprises, Inc. v. City of San Diego* (No. 730011), and *Otay Acquisitions, L.L.C. v. City of San Diego* (No. 753247). The city asserts that the plaintiffs in those cases are among the entities determined in this case to be alter egos of Roque De La Fuente II, and it asks this court to issue an opinion "clarifying" the res judicata effect of the judgment in this case on the two pending cases. We deny the request. The parties have raised no issue in this appeal concerning the alter ego finding made by the trial court, and the documents submitted by the city thus have no relevance to any issue in this appeal. Thus, any ruling we might make on the res judicata effect of the judgment in this case on cases which are not before us would be advisory and therefore beyond our jurisdiction. (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912, 83

[23] The quotation in *Bleeck v. State Board of Optometry, supra,* from the superseded edition of Witkin's California Procedure appears verbatim in the current edition. (7 Witkin, Cal. Procedure (4th ed.1997), Judgment, § 359, pp. 923-924.)

Cal.Rptr. 670, 464 P.2d 126; *Denny's, Inc. v. City of Agoura Hills* (1997) 56 Cal.App.4th 1312, 1329, 66 Cal.Rptr.2d 382.)

DISPOSITION

The judgments on the inverse condemnation claim regarding the airport and on the inverse condemnation claim regarding truck traffic are reversed. The trial court is directed to enter judgment for the city on those claims. The order granting the motion of the city for a new trial on the claim of breach of contract is affirmed. Costs on appeal are awarded to the city.

We concur: RICHLI and GAUT, JJ.

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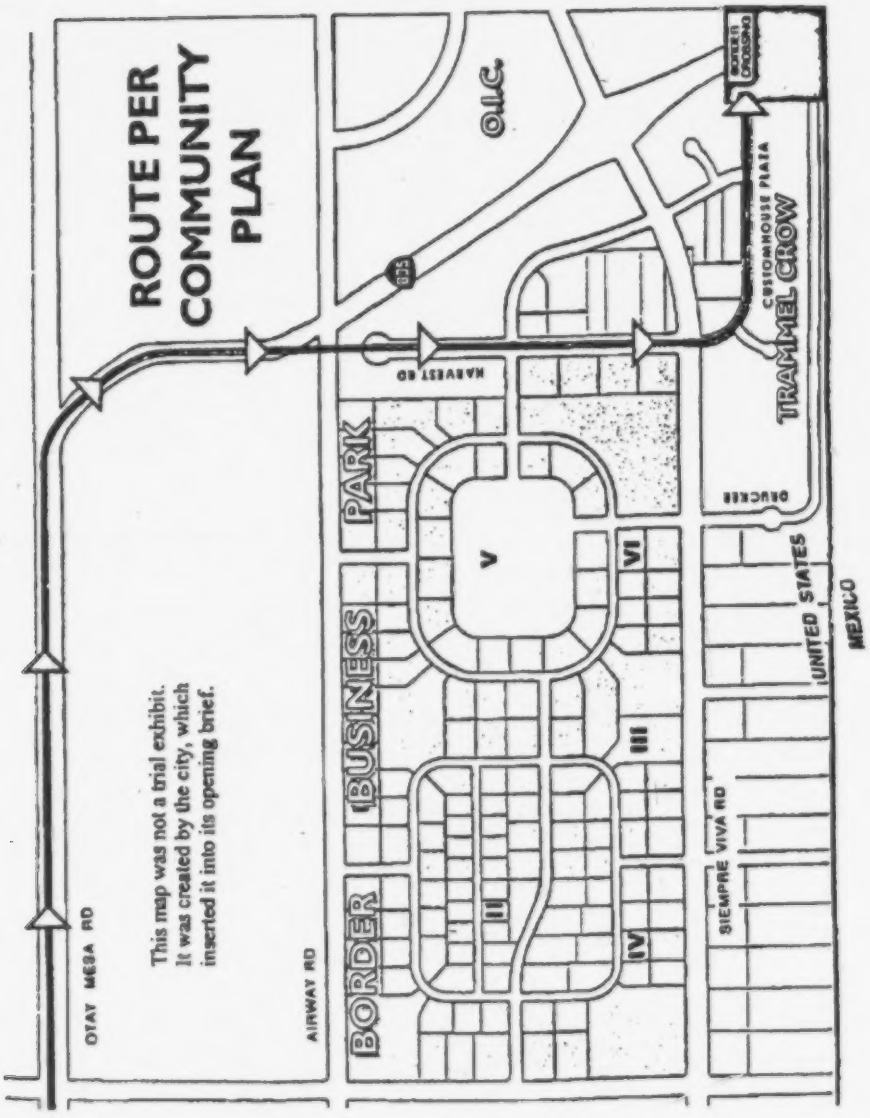

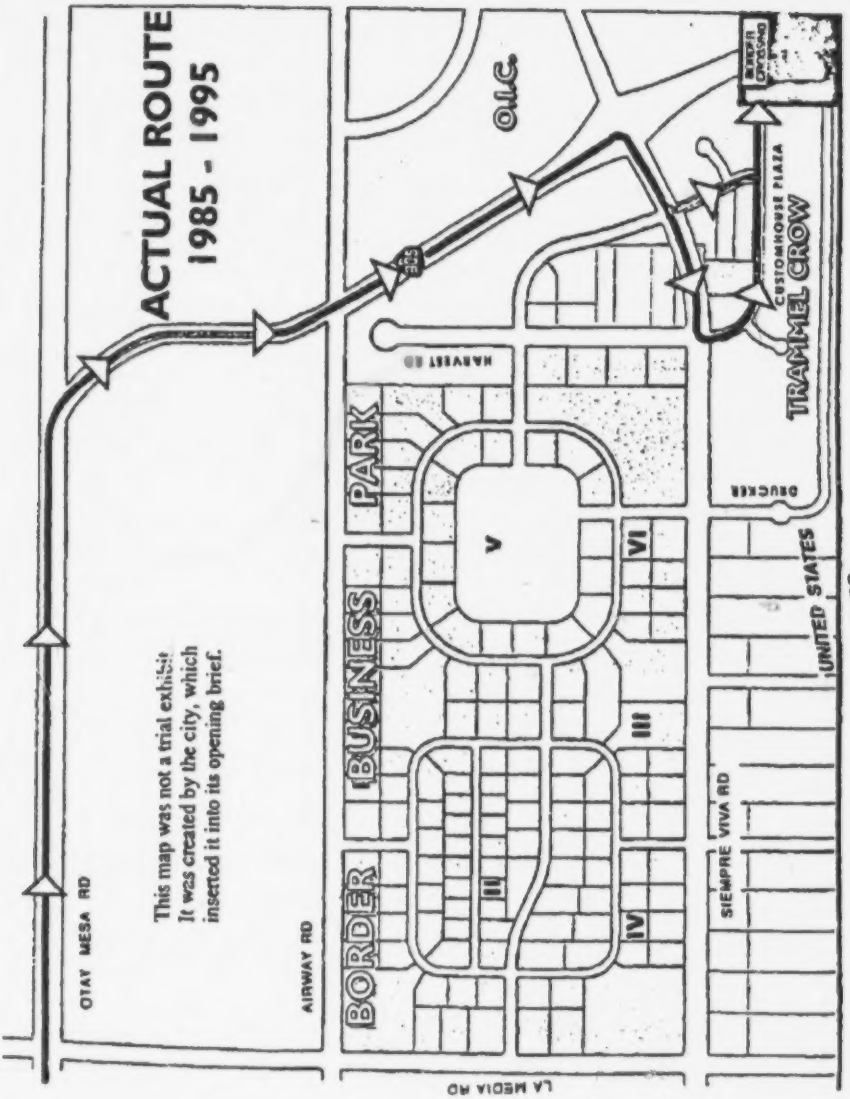
ACTUAL ROUTE
1985 - 1995
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AIRWAY RD
BORDER
BUSINESS
PARK
O.M.C.
HARVEST RD
V
VI
III
II
IV
SIEMPRE VIVA RD
DEVCKER
TRAMMEL CROW
CUSTOMHOUSE PLAZA
UNITED STATES
MEXICO
LA MESA RD

RE-ROUTE
DIAGRAM #1
1995 - TRIAL
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AIRWAY RD
BORDER
BUSINESS
PARK
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HARVEST RD
905
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SIEMPRE VIVA RD
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MEXICO
PROCESS
TRAMMEL CROW
CUSTOMHOUSE PLAZA
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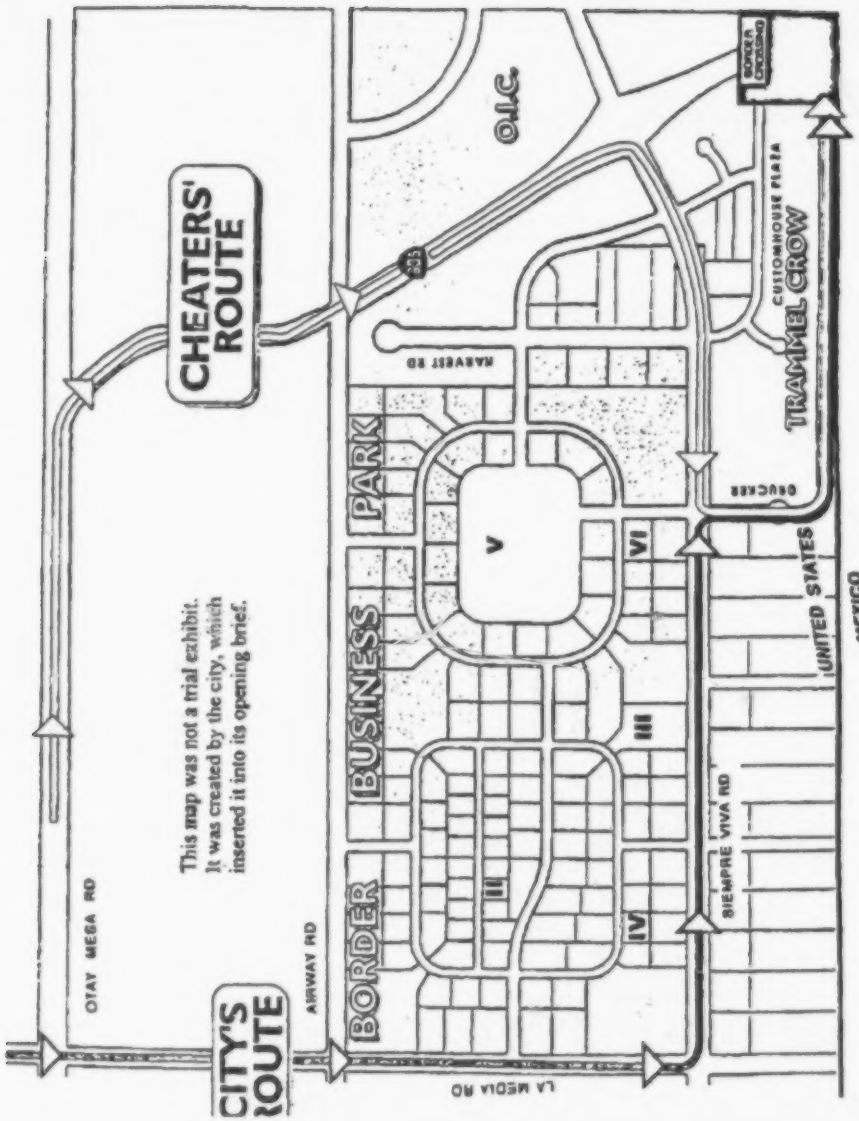
CHEATERS' ROUTE
CITY'S ROUTE
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OTAY MESA RD
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BUSINESS PARK
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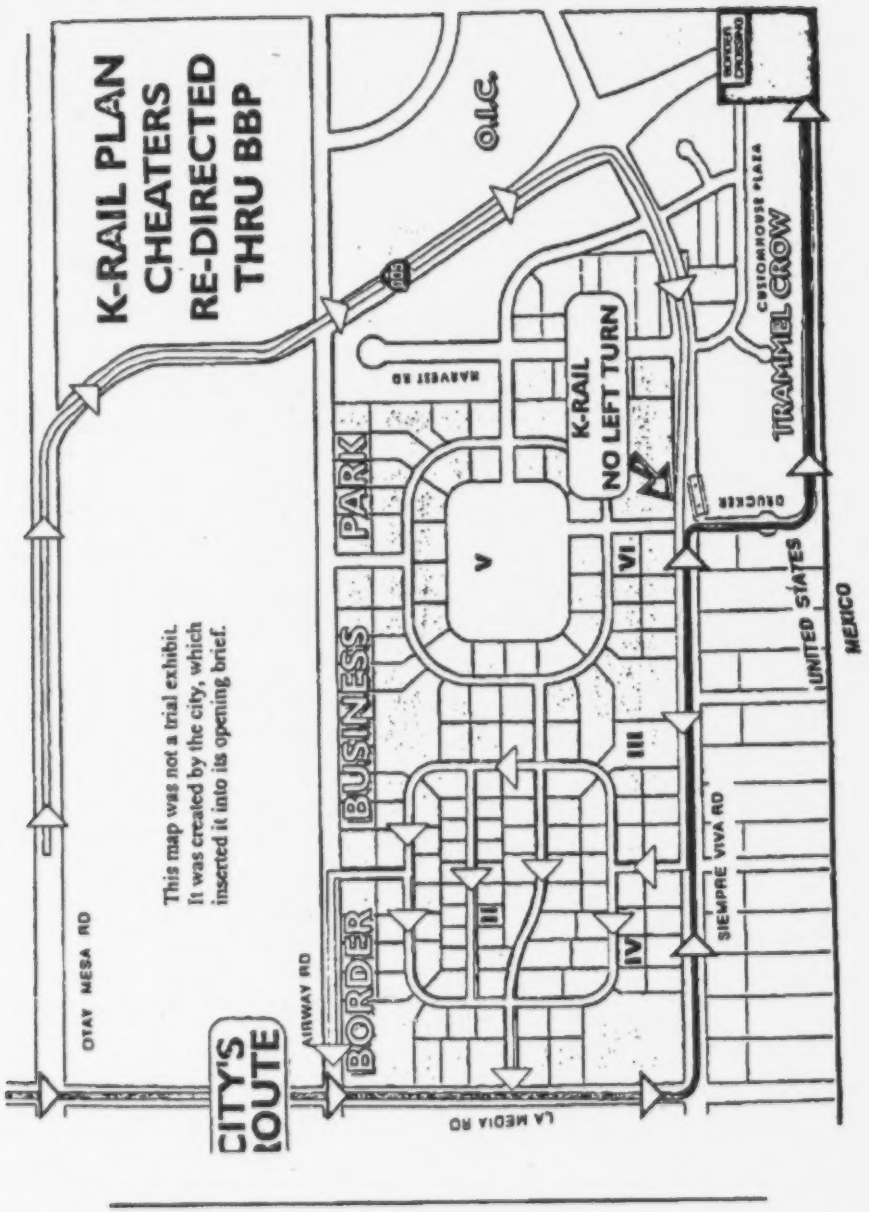
TRAMMEL CROW
UNITED STATES
MEXICO


K-RAIL PLAN
CHEATERS
RE-DIRECTED
THRU BBP
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CITY'S
ROUTE
OTAY MESA RD
AIRWAY RD
BORDER
BUSINESS
PARK
HARVEST RD
O.I.C.
K-RAIL
NO LEFT TURN
CUSTOMHOUSE PLAZA
TRAMMEL CROW
BRUCKER
UNITED STATES
MEXICO
SIEMPRE VIVA RD
LA MEDIA RD
I
II
III
IV
V
VI

Court of Appeal, Fourth Appellate District,
Div. 2 – No. E035881
S147706

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Jan. 3, 2007)

BORDER BUSINESS PARK INCORPORATED,
Plaintiff and Appellant,

v.

CITY OF SAN DIEGO, Defendant and Appellant.

Petition for review DENIED.

Corrigan, J., was absent and did not participate.

GEORGE
Chief Justice